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SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* TIMOTHY W. OMER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05–1101. Decided January 16, 2007

The petition for a writ of certiorari is denied.

Statement of JUSTICE SCALIA respecting the denial of the petition for writ of certiorari.

My dissent in *United States* v. *Resendiz-Ponce*, 549 U. S. ___ (2007), warned that the Court's opinion was "effecting a revolution in our jurisprudence regarding the requirements of an indictment," *id.*, at ___ (slip op., at 4), and that it would provide a license for the Government to avoid explicating the elements of a criminal offense whenever it feels the "common parlance" of the crime's name evokes them, *id.*, at ___ (slip op., at 1–2). I had not realized how quickly that license would be exercised. Barely 24 hours after we released *Resendiz-Ponce*, the Solicitor General filed a supplemental brief in this case, which raises the question (avoided in *Resendiz-Ponce*) whether the omission of an element of the offense from a federal indictment can constitute harmless error. The supplemental brief urged us not to grant review in this case for the following reason:

> "In the wake of the Court's decision in *Resendiz-Ponce* . . . it appears that the indictment in this case was not constitutionally deficient. As the Court has noted, it is well settled that the term 'fraud' requires a misrepresentation or concealment of material fact . . . just as the term 'attempt,' 'as used in the law for centuries,' encompasses an overt-act requirement, see *Resendiz-Ponce*, slip op., at 5. The indictment [for fraud] in this case therefore need not have separately alleged that

> the scheme at issue (or any statement made in the course of the scheme) was materially false or deceptive." Supp. Brief for United States 2.

That is not the reason I concur in the Court's decision to deny certiorari. It may, however, be a good reason—depending upon how the crime of fraud fares in our new some-crimes-are-self-defining jurisprudence. Another frontier of law opened by this Court, full of opportunity and adventure for lawyers and judges.